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**The Ardit Company and International Union of Bricklayers and Allied Craftworkers, Ohio Kentucky Administrative District Council, Local Union No. 18.** Case 09–CA–106395

December 12, 2013

**DECISION AND ORDER**

BY CHAIRMAN PEARCE AND MEMBERS HIROZAWA  
AND SCHIFFER

The Acting General Counsel seeks summary judgment in this case on the ground that there are no genuine issues of material fact as to the allegations of the complaint, and that the Board should find, as a matter of law, that the Respondent has violated Section 8(a)(5) and (1) of the Act by failing and refusing to bargain with the Union as the exclusive collective-bargaining representative of the unit.

Upon a charge filed by International Union of Bricklayers and Allied Craftworkers, Ohio Kentucky Administrative District Council, Local Union No. 18 (the Union) on June 3, 2013, the Acting General Counsel issued the complaint on June 20, 2013, against The Ardit Company (the Respondent), alleging that the Respondent has violated Section 8(a)(5) and (1) of the Act by refusing the Union's request to bargain following the Union's certification in Case 09–RC–083978. (Official notice is taken of the "record" in the representation proceeding as defined in the Board's Rules and Regulations, Secs. 102.68 and 102.69(g). *Frontier Hotel*, 265 NLRB 343 (1982).) The Respondent filed an answer admitting in part and denying in part the allegations in the complaint, and asserting affirmative defenses.<sup>1</sup>

On July 11, 2013, the Acting General Counsel filed a Motion for Summary Judgment. On July 15, 2013, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed a response.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

**Ruling on Motion for Summary Judgment**

The complaint alleges and the Respondent admits that, beginning May 13, 2013, the unit described in Section II.A, below, constitutes a unit appropriate for bargaining

within the meaning of Section 9(a) of the Act; that on May 13, 2013 the Union was certified as the exclusive collective-bargaining representative of the unit employees; that at all times since May 13, 2013 the Union has been the exclusive collective-bargaining representative of the unit employees; that the Union requested bargaining on May 17, 2013; and that the Respondent has thereafter refused to bargain.

The Respondent does not contest the Acting General Counsel's Motion for Summary Judgment on the basis of its request for review of the Regional Director's Decision and Direction of Election or its objections or challenges to ballots in the underlying representation case. Instead, the Respondent sets forth certain procedural arguments, including that the complaint is ultra vires because the Acting General Counsel did not lawfully hold that office at the time he directed that the complaint be filed. In this regard, the Respondent notes that Section 3(d) of the Act provides that "[i]n case of a vacancy in the office of the General Counsel the President is authorized to designate the officer or employee who shall act as General Counsel during such vacancy," and that "no person or persons so designated shall so act . . . for more than forty days when the Congress is in session unless a nomination to fill such vacancy shall have been submitted to the Senate." See 29 U.S.C. § 153(d). The Respondent contends that because the President failed to submit a nomination to the Senate to fill the Acting General Counsel's position within 40 days of designating Lafe Solomon as Acting General Counsel, Solomon could not serve in that position for more than 40 days and, as such, lacked authority to issue this complaint.

We find that there are no issues warranting a hearing because the Respondent has admitted the crucial factual allegations of the complaint as set forth above. The Respondent's argument that the Acting General Counsel lacked the authority to issue the complaint is rejected. Contrary to the Respondent, the Acting General Counsel was properly appointed under the Federal Vacancies Reform Act (Vacancies Act), 5 U.S.C. § 3345, which does not contain the limitation cited by the Respondent, and not pursuant to Section 3(d) of the Act. See *Muffley v. Massey Energy Co.*, 547 F.Supp. 2d 536, 542–543 (S.D. W. Va. 2008), *affd.* 570 F.3d 534 (4th Cir. 2009) (upholding authorization of 10(j) injunction proceeding by Acting General Counsel designated pursuant to the Vacancies Act). Thus, the complaint is not subject to attack based on Respondent's arguments concerning the circumstances of his appointment.

Accordingly, we grant the Motion for Summary Judgment.

On the entire record, the Board makes the following

<sup>1</sup> The Respondent asserts that the allegations of the complaint are barred in whole or in part by the statute of limitations. However, the record shows that the charge was filed on June 3, 2013, which is within 6 months of the Respondent's May 17, 2013 refusal to bargain. Therefore, the charge is timely under Sec. 10(b) of the Act.

## FINDINGS OF FACT

## I. JURISDICTION

At all material times, the Respondent, a corporation, with an office and place of business in Columbus, Ohio, has been engaged as a contractor in the construction industry.

During the 12-month period preceding the issuance of the complaint, the Respondent, in conducting its operations described above, purchased and received at its Ohio facilities goods valued in excess of \$50,000 directly from points outside the State of Ohio.

We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and that the Union, International Union of Bricklayers and Allied Craftworkers, Ohio Kentucky Administrative District Council, Local Union No. 18, is a labor organization within the meaning of Section 2(5) of the Act.

## II. ALLEGED UNFAIR LABOR PRACTICES

A. *The Certification*

Following a representation election held on August 10, 2012, the Union was certified on May 13, 2013, as the exclusive collective-bargaining representative of the employees in the following appropriate unit:

All tile, marble, and terrazzo installers and helpers employed by the Employer at or out of its facility in Columbus, Ohio, excluding office clerical employees and all professional employees, and guards and supervisors as defined in the Act.

The Union continues to be the exclusive collective-bargaining representative of the unit employees under Section 9(a) of the Act.

B. *Refusal to Bargain*

At all material times, Michelle Johnson has been the Respondent's president and has been a supervisor of the Respondent within the meaning of Section 2(11) of the Act and an agent of the Respondent within the meaning of Section 2(13) of the Act.

About May 17, 2013, the Union requested by letter that the Respondent bargain collectively with it as the exclusive collective-bargaining representative of the unit. Since about May 17, 2013, the Respondent has failed and refused to bargain with the Union as the exclusive collective-bargaining representative of the unit. We find that this failure and refusal constitutes an unlawful failure and refusal to bargain collectively with the Union in violation of Section 8(a)(5) and (1) of the Act.

## CONCLUSION OF LAW

By failing and refusing since about May 17, 2013, to bargain with the Union as the exclusive collective-bargaining representative of the employees in the appropriate unit, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

## REMEDY

Having found that the Respondent has violated Section 8(a)(5) and (1) of the Act, we shall order it to cease and desist, to bargain on request with the Union and, if an understanding is reached, to embody the understanding in a signed agreement.

To ensure that the employees are accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of the certification as beginning the date the Respondent begins to bargain in good faith with the Union. *Mar-Jac Poultry Co.*, 136 NLRB 785 (1962); accord: *Burnett Construction Co.*, 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (10th Cir. 1965); *Lamar Hotel*, 140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817 (1964).

## ORDER

The National Labor Relations Board orders that the Respondent, The Ardit Company, Columbus, Ohio, its officers, agents, successors, and assigns, shall

## 1. Cease and desist from

(a) Failing and refusing to recognize and bargain with International Union of Bricklayers and Allied Craftworkers, Ohio Kentucky Administrative District Council, Local Union No. 18 as the exclusive collective-bargaining representative of the employees in the bargaining unit.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

## 2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive collective-bargaining representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

All tile, marble, and terrazzo installers and helpers employed by the Employer at or out of its facility in Columbus, Ohio, excluding office clerical employees and all professional employees, and guards and supervisors as defined in the Act.

(b) Within 14 days after service by the Region, post at its facility in Columbus, Ohio, copies of the attached notice marked "Appendix."<sup>2</sup> Copies of the notice, on forms provided by the Regional Director for Region 9, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since about May 17, 2013.

(c) Within 21 days after service by the Region, file with the Regional Director for Region 9 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. December 12, 2013

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Mark Gaston Pearce, Chairman

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Kent Y. Hirozawa, Member

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Nancy Schiffer, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

<sup>2</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

## APPENDIX

### NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

#### FEDERAL LAW GIVES YOU THE RIGHT TO

- Form, join, or assist a union
- Choose representatives to bargain with us on your behalf
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities.

WE WILL NOT fail and refuse to recognize and bargain with International Union of Bricklayers and Allied Craftworkers, Ohio Kentucky Administrative District Council, Local Union No. 18 as the exclusive collective-bargaining representative of the employees in the bargaining unit.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the following bargaining unit:

All tile, marble, and terrazzo installers and helpers employed by us at or out of our facility in Columbus, Ohio, excluding office clerical employees and all professional employees, and guards and supervisors as defined in the Act.

THE ARDIT COMPANY